# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1623

ROBERT W. MONDAY AND JOHN A. MONDAY, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the district court (Pet. App. 15–28) is reported at 294 F. Supp. 1384. The opinion of the court of appeals (Pet. App. 1–14) is reported at 421 F. 2d 1210.

### JURISDICTION

The judgment of the court of appeals was entered on January 29, 1970 (Pet. App. 29). Petitioner's petition for rehearing was denied on March 17, 1970. The petition for a writ of certiorari was filed on May 28, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether a corporate officer, who knowingly, voluntarily and intentionally fails to pay over withheld taxes to the government in violation of his duty to do so, may escape the personal liability for such taxes imposed by Section 6672 of the Internal Revenue Code by showing "reasonable cause" for his failure.

2. Whether the court of appeals, in reversing the judgment of the district court with instructions to enter judgment for the United States against petitioner John A. Monday, violated his constitutional right to trial by jury and deprived him of property without due process of law.

## STATUTES INVOLVED

The pertinent provisions of Sections 3102, 3402, 6671, 6672 and 7501 of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*, pp. 11–12.

## STATEMENT

During the third and fourth quarters of 1960, the P. C. Monday Tea Company, of which petitioners were the officers responsible for the collection and payment to the government of federal income and social security taxes, paid wages to its officers and employees and withheld such taxes therefrom. It failed, however, to pay these withheld funds (totaling more than $12,000) to the government on October 31, 1960, and on January 31, 1961, the respective due dates for quarterly payments. Instead, the company, which was in a perilous financial condition, used the funds to pay business creditors for antecedent debts and for merchandise

purchased C.O.D. (Pet. App. 1–2; R. 201, 268, 289, 426–427.)[1] Consequently, the Internal Revenue Service determined that petitioners were liable for the 100 percent penalty imposed by Section 6672 of the Internal Revenue Code on responsible corporate officers who "willfully" fail to pay over withheld taxes (Pet. App. 3–4).

At trial before a jury, petitioner John Monday testified that during the period in issue he was aware that the withheld taxes were due and owing to the government and that he used such funds to pay business creditors of the company (Pet. App. 10; R. 428). Petitioner Robert Monday claimed that he was unaware of the withholding tax deficiency and therefore did not act "willfully" under the statute (R. 207, 242). There was testimony at trial, however, contradicting this assertion (Pet. App. 10–11; R. 219–220, 268, 277–278, 371, 388, 431).

Petitioners sought to justify their intentional and knowing misappropriation of government funds by reference to several meetings which they had with an Agent Pietrzak of the Internal Revenue Service. The first meeting took place on November 30, 1960, which was one month after the due date for third-quarter taxes. The P. C. Monday Tea Company had already misappropriated the tax monies collected from its employees during the third quarter of 1960, and thus, when this meeting took place, had created a deficiency situation which left the government the alternatives of put-

[1] "R." references are to the separately bound two-volume Appendix to petitioner's brief in the court of appeals.

ting the company out of business or permitting it to use current funds under strict limitations. According to petitioners, they were told by Mr. Pietrzak that if they kept current in their tax payments from then on, they would be permitted to continue operations and to pay for their merchandise on a C.O.D. basis. (Pet. App. 11–12; R. 432, 438–439.)

The second meeting was held in the latter part of March, 1961, after the P. C. Monday Tea Company, in derogation of the promise to Mr. Pietrzak that it would keep current, and in violation of the statute, had appropriated tax monies collected during the fourth quarter of 1960 to pay business creditors. At this meeting, Mr. Pietrzak required the company to pay $4,500 to cover taxes for the first quarter of 1961. (Pet. App. 12; R. 279, 433–434.)

After the jury was instructed, over the government's objection, that the term "willful" as used in Section 6672 "means a voluntary, conscious and intentional act, *done without reasonable cause*" (emphasis added) (Pet. App. 21), a verdict was returned which found that neither petitioner had acted willfully in failing to pay over the withheld taxes on the respective due dates (Pet. App. 4). The court of appeals ruled that reasonable cause was not a relevant consideration in determining willfullness. It reversed the judgment of the district court, which had been entered in accordance with the verdict, with instructions to enter judgment for the United States against petitioner John A. Monday and to grant a new trial to petitioner Robert Monday before a jury properly instructed on the issue of willfulness (Pet. App. 29).

ARGUMENT

The decision below is correct. There is no direct conflict or other warrant for further review.

1. Despite its denomination as a "penalty" assessment, it is well settled that the statutory liability imposed by Section 6672 of the Code is essentially civil in nature. *Cash* v. *Campbell*, 346 F. 2d 670, 673 (C.A. 5); *Botta* v. *Scanlon*, 314 F. 2d 392 (C.A. 2); *United States* v. *Strebler*, 313 F. 2d 402 (C.A. 8); *Bloom* v. *United States*, 272 F. 2d 215 (C.A. 9), certiorari denied, 363 U.S. 803.[2] Its primary purpose is to prevent the unnecessary loss of withheld federal income and social security tax monies, which, under Section 7501 (a), constitute a special fund in trust for the United States, by permitting the tax authority to reach those responsible for the misappropriation of such monies. *United States* v. *Graham*, 309 F. 2d 210, 212 (C.A. 9); *White* v. *United States*, 372 F. 2d 513, 516 (Ct. Cl.).

Thus, as petitioners concede (Pet. 13), the liability imposed by Section 6672 is not dependent upon a finding of evil motive or specific intent to defraud the government or deprive it of revenue on the part of the corporate officers. *White* v. *United States*, *supra*, p. 521. A responsible officer has acted "willfully" under the statute if he voluntarily, consciously and intentionally—as opposed to accidentally—elects to use the withheld funds in an impermissible manner (*e.g.*, to pay

[2] Section 7201 of the Code, on the other hand, imposes a criminal penalty for willful failure to collect or pay over taxes. See, *e.g.*, *Wilson* v. *United States*, 250 F. 2d 312 (C.A. 9).

corporate debts). *Spivak* v. *United States*, 370 F. 2d 612, 615 (C.A. 2), certiorari denied, 387 U.S. 908; *Cross* v. *United States*, 311 F. 2d 90, 94 (C.A. 4); *Hewitt* v. *United States*, 377 F. 2d 921, 924 (C.A. 5); *Flan* v. *United States*, 326 F. 2d 356, 358 (C.A. 7); *Bloom* v. *United States*, *supra*, p. 223; *Scott* v. *United States*, 354 F. 2d 292, 295 (Ct. Cl.). In line with these decisions, the court of appeals correctly concluded that "reasonable cause" and "justifiable excuse" are not proper considerations in determining whether a responsible officer willfully used withheld funds to pay corporate creditors.[3]

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[3] What petitioners allege as reasonable cause for their willful failure to pay over the tax monies—that their conduct was expressly authorized by a responsible Internal Revenue Service officer—is not even supported by the record. As the court of appeals noted (Pet. App. 11–12), the first meeting with Agent Pietrzak took place after petitioners had already misappropriated taxes withheld for the third quarter of 1960, and thus could provide no excuse for this action. Neither at this meeting nor at the subsequent meeting in March 1961, did the agent give the officers permission to deplete further the assets of the company available to satisfy the government's claim; nor did he advise them that, by permitting the business to remain in operation, he was relieving them of their potential liability under Section 6672 for any further withholding tax deficiencies that might arise. Moreover, at the first meeting, Agent Pietrzak specifically instructed the company to keep current (R. 279, 432), thereby precluding any claim that its subsequent failure to remit the fourth quarter taxes resulted from reliance upon his authorization to continue their business. The court of appeals therefore correctly concluded (Pet. App. 12) that, in any event, petitioners "failed to disclose any action by the Government upon which they could reasonably have relied as the grounds for their failure to collect and remit any of the taxes withheld from their employees."

2. The conflict which petitioners contend (Pet. 9–10) exists between the decision below and that of the Fifth Circuit in *Frazier* v. *United States*, 304 F. 2d 528, is not a real one. Although the court in *Frazier* did include the term "reasonable cause" in its definition of "willfulness" under Section 6672, the outcome of that case was not in any way dependent upon that construction of the statute. As the court itself there noted (304 F. 2d at 530):

> For the present we need only hold that in a civil case where a responsible officer paid employees their net wages at a time when the corporation had insufficient funds to cover the taxes thereon and, when such funds became available, preferred subsequent creditors over the United States, knowing at all times his obligation to pay such taxes, his failure to pay was "without reasonable cause" and "willful" within the meaning of Section 6672.

The Fifth Circuit's inclusion of the phrase "without reasonable cause" thus was irrelevant to its holding on the facts presented in *Frazier*. That holding on the facts does not conflict with the decision below.

Similarly, although in both *Cash* v. *Campbell*, 346 F. 2d 670, 672 (C.A. 5), and *Gefen* v. *United States*, 400 F. 2d 476 (C.A. 5), the Fifth Circuit mentioned "reasonable cause" as part of the "willfulness" test, its holdings on the facts of those cases in no way rested on the presence or absence of that factor, and the comments were in the nature of dicta. Whether, if confronted with the actual issue, the Fifth Circuit would permit a taxpayer to invoke "reasonable cause" where

the Seventh Circuit would not, remains to be determined. The allegation of conflict at this point is premature.[4]

3. Petitioner John Monday's claim that his constitutional rights to trial by jury and due process were denied by the court of appeals when it reversed the jury verdict in his favor and directed the district court to enter judgment against him is without merit. This Court has stated that "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding * * * without submission to the jury * * *." *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 479-480. And such

[4] There is no merit to petitioners' contention (Pet. 9-10) that several other circuit court cases conflict with the decision in the present case. *Gray Line Co.* v. *Granquist*, 237 F. 2d 390 (C.A. 9), involves a situation where the responsible officer was advised by counsel that the corporation had no obligation to collect the particular tax for the government. Hence, it did not involve the prerequisite of willfulness that the officer be aware that the tax was due and owing to the government. The decision did not rest upon a showing of reasonable cause for a willful failure to pay over funds collected for the government *and known to be due it*. Indeed, if *Gray Line* were to be construed as holding that reasonable cause can excuse an otherwise willful failure to pay over taxes known to be due and owing, it would then follow that it was overruled by the Ninth Circuit's later decision in *Bloom* v. *United States*, *supra*, where that proposition was squarely rejected.

In *United States* v. *Stygler*, 313 F. 2d 702 (C.A. 8), the question of willfulness was not even at issue. In *United States* v. *Slattery*, 333 F. 2d 844 (C.A. 3), the district court's judgment was affirmed *per curiam* without any reference to which, if any, of the alternative grounds given by the district court to support its decision were relied upon by the court of appeals.

action (which, indeed, is authorized by Rule 50 of the Federal Rules of Civil Procedure) has been repeatedly upheld by this Court against assertions that it violates the Seventh Amendment. See, *e.g.*, *Calloway* v. *United States*, 319 U.S. 372, 389. None of the cases cited by petitioners (Pet. 14) purport to hold to the contrary.

Since petitioner John Monday's only defense against the application of the penalty was based upon the alleged "reasonable cause" for his concededly willful act, the court below, having ruled as a matter of law that this was not a permissible consideration, properly directed that judgment be entered against him.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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# APPENDIX

Internal Revenue Code of 1954 (26 U.S.C. (1958 ed.)):

SEC. 3102. DEDUCTION OF TAX FROM WAGES.

(a) *Requirement.*—The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. * * *

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SEC. 3402. INCOME TAX COLLECTED AT SOURCE.

(a) *Requirement of withholding.*—Every employer making payment of wages shall deduct and withhold upon such wages * * * a tax equal to 18 percent of the amount by which the wages exceed the number of withholding exemptions claimed, multiplied by the amount of one such exemption as shown in subsection (b)(1).

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SEC. 6671. RULES FOR APPLICATION OF ASSESSABLE PENALTIES.

(a) *Penalty assessed as tax.*—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary or his delegate, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) *Person defined.*—The term "person," as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

SEC. 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

SEC. 7501. LIABILITY FOR TAXES WITHHELD OR COLLECTED.

(a) *General rule.*—Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

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